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Supreme Court, U.S.
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No. 03 468 SEP 26 2003

IN THE

Supreme Court of the United States

ROY S. MOORE, in his official capacity as Chief Justice of the Alabama Supreme Court,
Petitioner,

v.

STEPHEN R. GLASSROTH,
Respondent.

ROY S. MOORE, in his official capacity as administrative head of the Alabama Judicial System,
Petitioner,

v.

MELINDA MADDOX and BEVERLY J. HOWARD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's Establishment Clause jurisprudence is contrary to the Establishment Clause text of the First Amendment to the Constitution, and thus, whether *Lemon v. Kurtzman*, 403 U.S. 603 (1971), and its progeny, including the "no government endorsement test," should be overruled.

2. Whether this Court's "no government endorsement" test, as applied in this case, imposed an unconstitutional "religious test" upon Chief Justice Roy S. Moore in violation of the Free Exercise Clause as applied to the States.

3. Whether plaintiff-lawyers' claims of "offense" and "feeling" like outsiders failed the standing test of *Valley Forge Christian College v. Ams. United for Separation of Church and State*, 454 U.S. 464 (1982).

4. Whether the Establishment Clause applies to the States only upon allegation and proof of violation of plaintiffs' liberty interest protected by the Due Process Clause of the Fourteenth Amendment, and if so, whether there was such an allegation and proof of a deprivation of constitutional liberty in this case.

5. Whether, according to the original constitutional definitions of "law," "establishment," and "religion," the monument at issue in this case is a "law respecting an establishment of religion" forbidden by the First Amendment to the United States Constitution.

6. Whether the oath and supremacy clauses of Article VI of, and the Tenth Amendment to, the Constitution preclude a federal court from enjoining Chief Justice Roy S. Moore in the discretionary performance of his state statutory and constitutional duties.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alabama Chief Justice Roy S. Moore, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the decision of the United States District Court for the Middle District of Alabama: (1) finding the placement of a monument, containing Ten Commandments excerpts, in the Alabama State Judicial Building to be a violation of the Establishment Clause as applied to the States, and (2) enjoining the Chief Justice from failing to remove the monument, notwithstanding the Chief Justice's oath of office to support the United States and Alabama Constitutions, and the Tenth Amendment to the United States Constitution.

OPINIONS BELOW

The United States District Court opinion finding the monument to be in violation of the Establishment Clause, as applied to the States, was entered on November 18, 2002, and is reported at 229 F. Supp. 2d 1290 (M.D. Ala. 2002) (App. 44a). The United States District Court order and injunction requiring the Chief Justice to remove the monument was entered on December 23, 2002, and is reported at 242 F. Supp. 2d 1068 (M.D. Ala. 2002) (App 116a). The United States Court of Appeals for the Eleventh Circuit opinion affirming the District Court's opinion and order was entered on July 1, 2003, and is reported at 335 F.3d 1282 (11th Cir. 2003) (App. 1a).

JURISDICTION

The Court of Appeals entered its decision on July 1, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Supremacy and Oath provisions of Article VI of the United States Constitution, and the Establishment and Free Exercise Clauses of the First Amendment, the Tenth Amendment, and the Due Process

Clause of the Fourteenth Amendment to the United States Constitution. (App. 132a-33a). This case concerns also the Preamble to, the Oath provision of Article XVI, § 279 of, and § 6.10 of Amendment 328 to, the Alabama Constitution of 1901. (App. 133a-34a).

STATUTE INVOLVED

This case concerns Alabama Code § 12-3-30(a) and (b)(7). (App. 136a).

STATEMENT OF THE CASE

On January 15, 2001, following his election to the office of Chief Justice of the Alabama Supreme Court in November 2000, Chief Justice Roy S. Moore—as required by Article VI of the United States Constitution and by Article XVI, § 279 of the Alabama Constitution—swore the following oath:

> I, [Roy S. Moore], solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God.

Ala. Const. of 1901, art. XVI, § 279 (App. 134a).

A. The Monument

On August 1, 2001, in accordance with his oath, and pursuant to his constitutional and statutory responsibility and authority as administrative head of the Alabama judicial department, and as lessee of the Alabama State Judicial Building, Chief Justice Moore received and placed in the rotunda area of the Alabama State Judicial Building a monument containing: excerpts from the Ten Commandments; numerous excerpts from official American government documents—including the Declaration of Independence, the Pledge of Allegiance, the Judiciary Act of 1789, and the

Preamble to the Alabama Constitution; and excerpts from English and American lawyers and statesmen—including Sir William Blackstone, James Wilson, George Washington, Thomas Jefferson, James Madison, George Mason, and John Jay. *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1320-21 (M.D. Ala. 2002) (App 44a, 105a-107a).

At the August 1, 2001, dedicatory ceremony unveiling the monument, Chief Justice Moore stated that the monument "depict[s] the moral foundation of our law," and "remind[s] the ... judges ... of this state, the members of the bar ..., as well as the people of Alabama who visit the Alabama Judicial Building of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'" *Id.* at 1322 (App. 108a-109a). Quoting from Justice William O. Douglas's dissenting opinion in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Chief Justice explained that the monument would serve as a reminder that "there is an authority higher than the authority of the State, that there is a moral law which the State is powerless to alter, and that the individual possesses rights conferred by the Creator which government must respect." 229 F. Supp. 2d at 1322 (App. 109a).

Noting that many government officials have forgotten this "higher law" legacy—having "turned away from those absolute standards which form the basis of our morality and the moral foundation of our law"—the Chief Justice observed that our nation has "reaped the whirlwind, in our homes, in our schools and in our workplaces." *Id.* (App. 109a-110a). Recalling his campaign pledge "to restore the moral foundation of law," the Chief Justice asserted that "to restore morality, we must first recognize the source of that morality"—"the sovereign God and Creator recognized by America's forefathers, by the Pledge of Allegiance and by government officials, who have, since our nation's birth, consistently

pledged under oath, 'so help me God,' to uphold the Constitution." 229 F. Supp. 2d at 1322-23 (App. 110a).

The Chief Justice concluded his formal unveiling remarks by calling attention to the date: "[f]or it was on August 1, 1776, exactly 225 years ago today, that Samuel Adams ... delivered a speech prior to the formal signing of the Declaration of Independence ... stating, 'We have explored the temple of royalty and found that the idol that we have bowed down to has eyes which see not, ears that hear not our prayers, and a heart like the nether millstone.'" *Id.* at 1323 (App. 111a). The Chief Justice asserted that a "cry has gone out across our land for the acknowledgment of that God upon whom this nation and our laws were founded." *Id.* at 1322-23 (App. 111a). Echoing Adams' claim that "'[w]e have this day restored the Sovereign [Who] reigns in Heaven and with a propitious eye beholds his subjects assuming that freedom of thought and dignity of self-direction which he bestowed upon them,'" the Chief Justice expressed his hope that the placement of the monument would "mark the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land." *Id.* at 1323 (App. 111a-112a). Following these formal remarks, the Chief Justice briefed the audience on several of the official and historic references appearing on the monument's pedestal, explaining how the quoted passages "support ... the acknowledgment of the sovereignty of that God and those absolute standards upon which our laws are based." *Id.* at 1323-24 (App. 112a-114a).

Within two months after the monument's unveiling, the Chief Justice placed in the rotunda area two wall plaques: one entitled "Moral Foundation of Law," containing quotes from Martin Luther King, Jr. and Frederick Douglass, each of which referenced "the law[s] of God," 229 F. Supp. 2d at 1324-25 (App. 115a); the other, the Bill of Rights, containing the first Ten Amendments to the United States Constitution and

comporting with the "moral foundation of law" theme of the rotunda, *see id.* at 1296 (App. 52a).

B. The Law Suit

Thereafter, Plaintiff-lawyers Stephen Glassroth, Melinda Maddox, and Beverly Howard filed two separate law suits in the United States District Court for the Middle District of Alabama, seeking an injunction requiring the Chief Justice to remove only the monument, claiming that they were "offended" by the monument, which made them feel like "outsiders." 229 F. Supp. 2d at 1293, 1297-98, 1319 (App. 46a, 54a-56a, 102a). Invoking 42 U.S.C. § 1983, Plaintiff-lawyers claimed that the monument violated the Establishment Clause as applied to the States. *Id.* at 1293 (App. 46a). Assuming jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), District Court Judge Myron Thompson tried the two suits, ruling that the three Plaintiff-lawyers had standing and "that the evidence is overwhelming and the law is clear that the Chief Justice violated the Establishment Clause." *Id.* at 1293 (App. 45a).

1. Standing

The District Court rejected the Chief Justice's claim that the three Plaintiff-lawyers' "offense" was not caused by the monument, but by their disagreement with the Chief Justice's views on "separation of church and state." 229 F. Supp. 2d at 1297-98 (App. 54a-57a). Instead, the District Court concluded that the three were offended by the monument, which made them "feel" like outsiders, causing two of them to "change[] their behavior," and depriving all three of their "'use and enjoyment' of the rotunda." *Id.* at 1297 (App. 55a). The Court of Appeals affirmed that Plaintiffs Maddox and Howard had standing due to the fact that they had altered their behavior because they did not "shar[e] the Chief Justice's religious views," "consider[ed] the monument offensive," and "[felt] like outsiders." *Glassroth v. Moore*, 335 F.3d 1282, 1292

(11th Cir. 2003) (App. 21a). As for Plaintiff Glassroth, the Court of Appeals concluded that "we are not required to decide whether [he] ... who has not altered his behavior as a result of the monument, has standing." *Id.* at 1293 (App. 22a).

2. The Constitutional Text vs. Court Tests

Throughout the trial the Chief Justice maintained that the constitutionality of the monument should be measured by the constitutional text: Whether the monument constitutes a "**law** respecting an **establishment** of **religion**." While the District Court rejected on the merits the Chief Justice's contention that the monument was not a "law" (229 F. Supp. 2d at 1314-15 (App. 93a-94a)), it refused to address whether the monument respected an "establishment of religion," primarily because, in its opinion, the Chief Justice's constitutional definition of religion was contrary to modern precedent. *See* 229 F. Supp. 2d at 1313-14 (App. 90a-92a). Unwilling to ascertain a definition of religion that would conform to recent Supreme Court holdings, the District Court confessed that it "lack[ed] the expertise to formulate its own definition of religion for First Amendment purposes," and that to attempt to do so would be "dangerous" and "unwise." *See id.* at 1313 n.5, 1314 (App. 90a, 92a-93a).

Having refused the Chief Justice's invitation to adhere to the constitutional definition of religion, as propounded by James Madison and adopted by this Court, the District Court assessed the constitutionality of the monument by applying the so-called *Lemon* purpose and endorsement tests: whether the purpose of the monument was "non-secular" and whether a reasonable observer would conclude that the monument endorsed religion. 229 F. Supp. 2d at 1299-1304 (App. 58a-71a). Without any attempt to define either "religion" or "non-secular," the District Court found that the monument failed both tests because the monument acknowledged the Judeo-Christian God as the

source of the moral foundation of American law. *See id.* at 1299-1304 (App. 58a-71a).

The Court of Appeals affirmed the District Court's refusal to be governed by the text of the Establishment Clause, insisting that recent Supreme Court precedent "foreclosed" the Chief Justice's contention that the monument was neither a "law" nor "religion," and thus was not forbidden by the express terms of the Establishment Clause. 335 F.3d. at 1294-95 (App. 25a-27a). Instead, the Court of Appeals substituted this Court's *Lemon* test for the constitutional text, and without defining either "non-secular" or "religion," affirmed the District Court's finding of an impermissible "non-secular" purpose and "endorsement of religion." *Id.* at 1295-97 (App 27a-32a).

3. This Ten Commandments Case

After applying the *Lemon* test, the Court of Appeals surveyed other Ten Commandments cases, and concluded that the District Court's resolution of **this** Ten Commandments case was consistent with other lower federal court decisions striking down factually similar Ten Commandments displays, and not inconsistent with factually dissimilar displays that have been upheld. 335 F.3d at 1298-1301 (App. 34a-39a). Indeed, the District Court prefaced its opinion with the "announce[ment] [that it] does not hold that it is improper in all instances to display the Ten Commandments in government buildings; nor does [it] hold that the Ten Commandments are not important, if not one of the most important, sources of American law." 229 F. Supp. 2d at 1293 (App. 45a). The court even acknowledged that the evidence in this case established that "the first tablet" of the Ten Commandments "has secular aspects," as "the Chief Justice pointed out in his speech unveiling the monument in his reference to Samuel Adams's "referring to the King as a false idol, alluding to the Commandment that 'Thou shalt have no other Gods before me.'" *Id.* at 1300 App. 60a). Nevertheless, the District Court found "that the Chief Justice's actions and

intentions in this case crossed the Establishment Clause line between the permissible and the impermissible." *Id.* at 1293 (App. 45a-46a).

In examining the "actions and intentions" of the Chief Justice, the District Court did not conduct a "deferential and limited"[1] review of the Chief Justice's official actions and statements in relation to the placement of the monument. Instead, the court engaged in a wide-ranging survey of the Chief Justice's personal religious views and professional legal opinions, including the Chief Justice's views of the Establishment Clause as set forth in a law review article published years before he became Chief Justice (*see id.* at 1311, 1312-13 (App. 85a, 88a-98a)), and the Chief Justice's views of the relationship between church and state as stated in a dissenting opinion in a case before the Alabama Supreme Court. *See id.* at 1309 (App. 80a-82a). After this intrusive odyssey through the mind and heart of the Chief Justice, the court emerged to apply the "purpose" prong of the *Lemon* test without distinguishing between the Chief Justice's "purpose" and "motive" "because of the extent to which the Chief Justice's religious views control his understanding of the structure of government." *Id.* at 1316 n.6 (App. 96a). Thus, in reaching the conclusion that the purpose of the monument was "non-secular," the District Court examined the monument, and the Chief Justice's official actions thereto, through the prism of the Chief Justice's general religious and legal philosophy, rather than by reference to the texts on the monument or to the Chief Justice's actual statements and actions taken in relation thereto. Thus, the District Court's finding that the monument's purpose was impermissibly religious was inextricably intertwined with its finding that the Chief Justice's personal and legal views, insofar as they informed his official actions,

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[1] *See Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring).

were constitutionally impermissible. *See id.* at 1299-1301 (App. 58a-64a).

The Court of Appeals deferred to these District Court findings, maintaining that "the purpose inquiry is a factual one ..., and on appeal we are obligated to accept the district court's findings of fact unless they are clearly erroneous." 335 F.3d at 1296-97 (App. 30a). Indeed, the Court of Appeals prefaced its entire opinion with the explanation that "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." *Id.* at 1288 (App. 13a). Thus, the Court of Appeals, like the District Court, made no effort to limit its inquiry into the actual purpose of the monument, as reflected by the monument itself and the Chief Justice's official action thereto, but rather relied upon the District Court's probe into the Chief Justice's religious and legal views and attributed them to the monument. *See id.* at 1286-87 (App. 8a-10a).

4. The Chief Justice's Oath

Having made the Chief Justice's personal religious and legal views their constitutional litmus test, both the District Court and the Court of Appeals highlighted the conflict between the District Court's injunction and the Chief Justice's oath to support the United States and Alabama constitutions. Initially, this conflict was averted by the District Court's decision to decline to "enter an injunction requiring Chief Justice Moore to remove his Ten Commandments monument forthwith," preferring instead to enter a declaratory judgment that the monument violated the Establishment Clause as applied to the States. 229 F. Supp. 2d at 1319 (App. 102a-103a). When the Chief Justice did not voluntarily remove the monument, the District Court issued an injunction directing the Chief Justice to remove the monument. 242 F. Supp. 2d at 1067 (App. 116a). With the issuance of the injunction, the Chief Justice was faced with the choice of either conforming his official

conduct to the District Court's order or to his oath to support the First Amendment to the United States Constitution, and to the Preamble to the Alabama Constitution. This conflict was again averted by the District Court's grant of a stay of the injunction pending the Chief Justice's appeal to the Court of Appeals. *Glassroth v. Moore*, 242 F. Supp. 2d 1068 (M.D. Ala. 2002) (App. 118a).

The Court of Appeals summarily dismissed the Chief Justice's claim that the District Court's injunction required him to violate his oath of office as being no different from "the ... position taken by those southern governors who attempted to defy federal court orders during an earlier era." 335 F.3d at 1302 (App. 42a). Not only did the Court of Appeals consider the Chief Justice's claim to be contrary to judicial precedent and Article III, § 1 and Article VI, cl. 2 of the United States Constitution, but a direct threat to the rule of law:

> The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state supreme court, of all people, should be expected to abide by that principle. We do expect that if he is unable to have the district court's order overturned through the usual appellate processes, when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.

335 F.3d at 1303 (App. 43a).

5. The Case on Remand to the District Court

Upon remand, and notwithstanding the Chief Justice's objection, on August 5, 2003, the District Court "lifted and dissolved" its December 23, 2002 stay, reinstated its December 19, 2002 order to "enjoin and restrain" the Chief Justice "from failing to remove ... the Ten Commandments monument, and set a new date—August 20, 2003—for the monument to be

removed "from the non-private areas of the Alabama State Judicial building." *Glassroth v. Moore*, No. 01-T-1268-N, slip op. at 5 (M.D. Ala. Aug. 5, 2003) (App. 127a). Consistent with the Chief Justice's testimony prior to the issuance of the December 23, 2002 injunction that he could not obey the order and, at the same time, be true to his oath of office, the Chief Justice declined to remove the monument.[2]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS CONSTITUTIONAL ISSUES THAT THIS COURT MUST ADDRESS.

There are compelling reasons why this Petition should be granted. First, this Court has failed to discharge its duty to provide a uniform rule of law governing Establishment Clause cases, as required by Articles III and VI of the United States Constitution. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). Second, because this Court has failed to conform its Establishment Clause jurisprudence to the Constitution, it has led to a misuse of the power of judicial review, which presupposes that judges will be faithful to their oaths to submit to the written constitution as their "rule of government." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

Even though several members of this Court over the past twenty-three years have found this Court's Establishment Clause jurisprudence to be seriously deficient, the Court has failed to provide a remedy. As a consequence of this failure,

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[2] Although not parties to the case, the District Court's final judgment and injunction were served on the eight Associate Judges of the Alabama Supreme Court. On August 27, 2003, "pursuant to their obligation to comply, the eight Associate Justices ordered the building manager to remove the monument." *McGinley v. Houston*, No. 03-T-0895-N, slip op. at 5, 2003 WL 22150719 (M.D. Ala. Sept. 04, 2003). Thus, as of the filing date of this Petition, the monument is situated in a closet behind locked doors in the State Judicial Building. *See id.*

the lower federal courts are floundering in a sea of precedents with no legal rudder. As the Court of Appeals below observed, "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." 335 F. 3d at 1288 (App. 13a). Thus, the Court of Appeals concluded that because "factual specifics and context are everything when it comes to applying the Establishment Clause to religious symbols and displays" (*id.* at 1300 (App. 38a)), it was required by its "clear error" rule to defer to the District Court's findings of fact. *See id.* at 1291 (App. 19a). In so doing, the Court of Appeals has dramatically revealed that, under this Court's prevailing *Lemon* test, Establishment Clause cases turn not on careful appellate review of the application of legal norms, but on the fact-finding discretion of trial judges. Rulings in Establishment Clause cases, then, turn not on a uniform rule of law. It is time, therefore, for this Court to seriously reexamine *Lemon v. Kurtzman*, 403 U.S. 603 (1971), and its progeny.

The failure to provide a clear rule governing the Establishment Clause has not deterred lower federal courts from issuing injunctions requiring government officials to conform their conduct to their constitutional interpretations. Thus, even though the Court of Appeals below recognized that this case was not decided by a "bright-line rule," but upon a trial court's fact-finding discretion, it still proclaimed that "the rule of law" requires the highest judicial officer of a state to put aside his oath of office to support the Constitution of the United States and the Constitution of his state, and obey a district court's injunction, unless reversed by a higher court. *See* 335 F. 3d at 1303 (App. 43a). According to Article VI of the United States Constitution, State officers—judicial, executive, and legislative—take the same oath of office to support the United States Constitution as do federal judges. In so doing, state officers swear allegiance to "[t]his Constitution ... as the supreme law of the land," not allegiance to the

federal judiciary. It has been commonly assumed, however, that judicial precedent controls the Constitution. This assumption is not true. As Chief Justice Marshall asserted in *Marbury v. Madison*, a federal judge takes an oath to decide cases "agreeably to the constitution," not agreeably to judicial precedent. *See* Marbury, 5 U.S. at 180. Furthermore, in the exercise of the power of judicial review, the federal courts are subject to the checks and balances of the judicial, executive and legislative officers of the fifty independent and sovereign states, as well as by Congress and the President. As is true of the President and Congress, who cannot be enjoined by the federal courts to perform their discretionary duties of office (*see Franklin v. Massachusetts*, 505 U.S. 788, 802-803 (1992) (plurality)), no state chief justice, governor, or legislature may be so enjoined. To rule otherwise is to establish rule by judges, not the rule of law.

In this 200th anniversary year of *Marbury v. Madison*, this case presents a unique opportunity to affirm that this Court's actions—like the actions of the President, Congress, and state officials—are governed by the express words of the Constitution, itself. Indeed, this case presents to this Court an obligation to revisit its precedents to ascertain if they comply with the rule of the Constitution. If this Court fails to review this case, it would send a clear signal that the federal judiciary is above the Constitution, undermining the very foundation of judicial review recognized in *Marbury*: That a judge must be true to his sworn oath of office to decide each case "agreeably to the constitution of the United States." 5 U.S. at 180.

II. MODERN ESTABLISHMENT CLAUSE JURISPRUDENCE IS BANKRUPT.

As Justice Souter has recently observed, this Court's Establishment Clause jurisprudence has reached "doctrinal bankruptcy." *Zelman v. Simmons-Harris*, 536 U.S. 639, 688 (2002) (Souter, J, dissenting). Seven years earlier, Justice

Thomas came to a similar conclusion, stating that this Court's "Establishment Clause jurisprudence is in hopeless disarray." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). Two years before that, Justice Scalia joined his voice with a chorus of academic critics that this Court's "Establishment Clause [cases constitute a] geometry of crooked lines and wavering shapes." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring). And thirteen years previously, Justice Stevens bemoaned the fact that this Court's Establishment Clause precedents have presented to the courts "the sisyphean task of trying to patch together 'the blurred, indistinct and variable barrier' described in *Lemon*," this Court's leading Establishment Clause precedent. *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

Rather than address a failed Establishment Clause jurisprudence, this Court has justified it, explaining that "it 'sacrifices clarity and predictability for flexibility.'" *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting) (quoting *Committee for Public Educ.*, 444 U.S. at 662). As Professor Jesse Choper has written, however, this explanation is a "euphemism ... for... the absence of any principled rationale." J. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 680-81 (1980). As this case demonstrates, it is time to overrule *Lemon*, and return to the Establishment Clause text.

A. The *Lemon* Test Is Not A Rule Of Law.

The Court of Appeals below asserted that "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." 335 F.3d at 1288 (App. 13a). Thus, the Court of Appeals' review of the District Court's decision was fact-oriented and limited to a "review [of the] District Court['s] fact findings

only for clear error." *Id.* at 1291 (App. 19a). While such deference to a trial court's findings of fact provides maximum "flexibility," such flexing of judicial discretion has fractured the Establishment Clause that this Court is sworn to support.

First, such invertebrate adjudication provides an altogether too convenient way to reconcile all Establishment Clause decisions without the guidance of a uniform rule. All a court need do is find some factual difference, and every Establishment Clause case may be reconciled with every other one, even when the subject is the same, such as public displays of the Ten Commandments on government property. *See id.* at 1298-1301 (App. 34a-40a).

Second, ad hoc decision-making excuses this Court from having to exercise its supervisory power over conflicting decisions of the United States Courts of Appeals. *See* Sup. Ct. Rule 10(a). According to this Court's Establishment Clause "flexibility" policy, as applied by the Court of Appeals below, there would never arise a case where a Ten Commandments display case would merit review by this Court on the ground that the Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." There can simply be no conflict if each Ten Commandments display case can be factually distinguished from every other one. Indeed, in light of recent decisions denying certiorari in Ten Commandments cases, it appears that this Court is sending a signal to the lower courts that they may resolve these cases at their discretion. *See, e.g., Elkhart v. Books*, 532 U.S. 1058 (2001). Thus, in the Establishment Clause arena the Constitution is not the supreme law of the **land**, but varies circuit to circuit, and district to district, depending on the specific facts and circumstances of each case as determined by individual judges.

Third, this Court's Establishment Clause "flexibility" policy covers up a legal void recognized by numerous courts of

appeal and district judges. As the Fifth Circuit Court of Appeals observed in *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), *rev'd sub nom. Mitchell v. Helms*, 530 U.S. 793 (2000), this Court's Establishment Clause jurisprudence is a "vast, perplexing desert."[3] The United States Court of Appeals for the Fourth Circuit recently chafed at having to "venture into the often-dreaded and certainly murky area of Establishment Clause jurisprudence." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999). *See also Smith v. Blue Valley Unified Sch. Dist.*, 1989 WL 42652, *4 (D. Kan. 1989). The United States Court of Appeals for the Tenth Circuit likewise shuddered upon entry into the Establishment Clause thicket "due to the inherent difficulty of attempting to discern an individual's unexpressed or psychological motive, [which] exacerbate[s] what is already perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 561 (10th Cir. 1997). *See also First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1174 (D. Utah 2001), *rev'd*, 308 F.3d 1114 (10th Cir. 2002) ("Establishment Clause case law is notoriously confused and difficult").

Such observations are especially applicable to the so-called "religious display" cases. Recently, the Third Circuit applied this Court's "murky" *Lemon* test, to resolve an Establishment Clause challenge to a seventy-year-old Ten Commandments plaque, placing great emphasis on the facts, including the location of the plaque away from the main entrance to a county courthouse. *Freethought Soc. of Greater Phila. v. Chester County*, 334 F.3d 247, 256 261-62 (3rd Cir. 2003). The Third Circuit's emphasis upon the unique facts in Chester County

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[3] This Court acknowledged that "the case's tortuous history ... indicates well the degree to which our Establishment Clause jurisprudence has shifted ... while nevertheless retaining anomalies with which the lower courts have had to struggle." *Mitchell v. Helms*, 530 U.S. 793, 804 (2000).

parallel the conclusions of the Court of Appeals below "that factual specifics and context are nearly everything when it comes to applying the Establishment Clause to religious symbols and displays." *Glassroth*, 335 F.3d at 1300 (App. 38a). As the Third Circuit Court of Appeals has observed: "The uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). No wonder, Justice Scalia has confessed that "it is a sufficient embarrassment that [this Court's] Establishment Clause jurisprudence regarding holiday displays ... has come to 'require scrutiny more commonly associated with interior decorators than with the judiciary.'" *Lee v. Weisman*, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting).

By its assertion that "factual specifics and context are nearly everything when it comes to applying the Establishment Clause," the Court of Appeals below dispensed with any notion that it had to give any principled reason for distinguishing one case from another. *See* 335 F.3d at 1300-01 (App. 38a-40a). Thus, the Court of Appeals below has chosen the same path as the Court of Appeals for the Fifth Circuit which has "eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because ... a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993).

B. The *Lemon* Test Undermines The Rule Of Law.

Even when the lower federal courts have attempted to apply a legal test to resolve an Establishment Clause case, they have found a "cherry-picking" array of choices. In *Stone v.*

Graham, 449 U.S. 39 (1980), this Court applied the original formulation of the "three-part" *Lemon* test to assess the constitutionality of a Ten Commandments display.[4] While the *Lemon* test appears to be the test of choice in Ten Commandments display cases, as it was in the courts below (335 F.3d at 1295-97 (App. 27a-32a); 229 F. Supp. 2d at 1299-1301 (App. 58a-64a)), it is uncertain whether the classic *Lemon* test as applied by this Court in *Stone* is the *Lemon* test of today's Court. In *Agostini v. Felton*, a majority ruled that the third prong—concerning "excessive entanglement"—has been merged into the second prong which, itself, had previously been transformed into a "no government endorsement of religion" test. *See Agostini v. Felton*, 521 U.S. 203 (1997). Some courts of appeals, including the Court of Appeals below, have paid no attention to this metamorphosis, preferring the original *Lemon* test. *See Glassroth*, 335 F.3d at 1295-96 (App. 27a-28a). *See also Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003). The Court of Appeals for the Third Circuit, however, has even modified this Court's two-step *Lemon* test, reducing it to one: whether a Ten Commandments display constitutes an endorsement of religion. *See Freethought Soc. of Phila.*, 334 F.3d at 258. In effect, so has the Court of Appeals below, giving lip-service to the classic three-part *Lemon* test, but conducting plenary review only of the "endorsement" prong. 335 F.3d at 1297 (App. 31a-32a).

In addition to fostering this revisionist impulse by criticism of the *Lemon* test (*see Lee v. Weisman*, 505 U.S. at 644 (Scalia, J., dissenting)), this Court has opened the door to disregarding the *Lemon* test altogether. In *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court discarded the *Lemon* test, in order to

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[4] *Stone* has become the touchstone of all Ten Commandment display cases, as it was in the Court of Appeals below. *See* 335 F.3d at 1295 (App. 27a, 30a). Yet, as Justice Rehnquist stated in his dissent, *Stone* was decided without full briefing on the merits and oral argument. 449 U.S. at 47.

uphold the constitutionality of legislative chaplaincies. One year later, this Court forthrightly stated its "unwillingness to be confined to any single" test in the Establishment Clause area. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). As a consequence, it has left the lower federal courts at large, not only as to the **kind** of *Lemon* test to be applied, but whether to apply *Lemon* at all. Both of the courts below refused Chief Justice Moore's invitation to follow *Marsh*, rather than *Lemon*, primarily because the Chief Justice could not demonstrate that the Ten Commandments displays were on an exact historical parallel with legislative chaplaincies. *See* 335 F.3d at 1297-98 (App. 32a-34a); 229 F. Supp. 2d at 1305-08 (App. 72a-79a). While this Court has warned against too broad a reading of *Marsh*, this Court has utterly failed to provide the lower federal courts with any principled guideposts governing its application. *See, e.g., ACLU v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 300-01 (6th Cir. 2001). Truly, as Justice Scalia has noted, the *Lemon* test, although much maligned and modified, has survived because it is a convenient tool "invoke[d]" by the courts "[w]hen [they] wish to strike down a practice it forbids." *Lamb's Chapel*, 508 U.S. at 399.

C. The No Endorsement Test Violates Free Exercise.

Adherence to the "no government endorsement" variation of the *Lemon* test has invited a slew of cases challenging Ten Commandments monuments on the sole ground that a plaintiff is offended by the monument, made to feel like a second-class citizen, and who has changed his behavior, however slightly, as a consequence of having taken offense. *See County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring). By rote repetition of this legal mantra, plaintiffs have gained access to a federal court to stop government actions with which they disagree, despite this Court's ruling that no person has standing to litigate an Establishment Clause claim simply because he has suffered a "psychological" injury "produced by observation of conduct with which one

disagrees." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982).

According to the Court of Appeals below, the Plaintiffs in this case—all lawyers—were "offended," made to "feel like outsiders," and, as a consequence, two of the three "altered their behavior" because of "the wound ... inflicted [upon them] by the monument itself," not because they disagreed with the Chief Justice's "views about religion and government." *Glassroth*, 335 F.3d at 1293 (App. 22a). But, in another part of its opinion, the Court of Appeals found the monument was inseparable from the Chief Justice's views! Since the monument was so inseparable from the Chief Justice's religious views, it is impossible for anyone to conclude that any one of the three Plaintiff-lawyers' claimed offense and hurt feelings were the consequence of anything other than the observation of the Chief Justice's "religious views" with which each disagrees. *See* 335 F.3d at 1292-93 (App. 20a-23a).

By sustaining the Plaintiffs' standing in this case, then, the Court of Appeals has enabled Plaintiffs to parlay their hurt "feelings" into judicial imposition of second-class citizenship upon Chief Justice Moore because he has "religious views" of law and government. After all, had the Chief Justice had "secular" views of how justice should be administered, and pursuant thereto had erected a monument dedicated to the works of Oliver Wendell Holmes, no plaintiff could have sustained access to a federal court even if they were "offended" and made to "feel like outsiders" by Holmes' legal positivist views. Thus, by affirming Plaintiff-lawyers' standing in this case and finding that the Chief Justice has "endorsed" a theistic view of the moral foundation of law, the Court of Appeals has effectually imposed a "religious test" upon Chief Justice Moore. After all, if the Chief Justice held to a more pluralistic view, erecting a monument that identified God as only one of many sources of law, the District Court would apparently have

found the monument to have a secular purpose and to not be an "endorsement of religion," and the Court of Appeals would have affirmed. *See* 229 F. Supp. 2d at 1299 (App. 58a-60a); 335 F.3d at 1296-97 (App. 28a-32a).

Warning against such misuse of the Establishment Clause, Justice Brennan opined that under the Free Exercise Clause:

> Government may **not** inquire into the religious beliefs and motivations of officeholders—it may **not** ... question whether their ... actions stem from religious conviction.... In short, government may **not** as a goal promote "safe thinking" with respect to religion and fence out from political participation those ... whom it regards as overinvolved in religion.... The Establishment Clause ... may **not** be used as a **sword** to justify repression of religion or its adherents from any aspect of public life.

McDaniel v. Paty, 435 U.S. 618, 641-42 (1978) (Brennan, J., concurring in the judgment) (emphasis added).

D. The *Lemon* Test Undermines The Tenth Amendment.

When applied to the actions of state officials, the "no endorsement" test not only misapplies the First Amendment's prohibition against laws respecting establishments of religion, but unconstitutionally intrudes upon the Tenth Amendment. As Justice Thomas has recently written, the Establishment Clause was originally written to preserve to the states "greater latitude in dealing with matters of religion." *Zelman*, 536 U.S. at 680 (Thomas, J., concurring). Such latitude is evidenced in the preambles of almost all of the fifty state constitutions, including Alabama's preamble which invokes the favor and guidance of Almighty God in the formation of its civil government and in the administration of justice. *See* C. Millard, *The Christian Heritage of the 50 United States of America* (2000). To deny to the highest judicial officer of Alabama, under the guise of the Establishment Clause, the discretion to

place a monument acknowledging God as the moral foundation of law is to turn that Clause on its head. As Justice Thomas has pointed out in his *Zelman* concurrence, there is nothing in the Fourteenth Amendment that changes the original state protective design of the Establishment Clause unless there is evidence that the state official's legislative action has impaired the "liberty" interest of a person in contravention of the Due Process Clause. 536 U.S. at 697.

E. The *Lemon* Test Violates The Establishment Clause.

As an antidote to a diseased Establishment Clause jurisprudence, Chief Justice Moore prescribed **not** another test, but the healing remedy of the constitutional text. Reminding the courts below that the first rule of constitutional interpretation is to attend to the meaning of each word of the text (*see Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840)), the Chief Justice contended that the monument was not "a law respecting an establishment of religion." He maintained that the monument was not a "law" because it prescribed no "rule of civil conduct commanding what is right and prohibiting what is wrong." *See* I W. Blackstone, *Commentaries on the Laws of England* 44 (Univ. of Chi. Facs. ed. 1765). Rather, the Chief Justice maintained that the monument was simply a "decorative reminder of the moral foundation of law." *Glassroth*, 335 F.3d at 1294. Second, the Chief Justice relied on the original definition of religion as set forth in Art. I, § 16 of the Virginia Constitution and James Madison's 1785 *Memorial and Remonstrance*, and as embraced by this Court in *Reynolds v. United States*, 98 U.S. 145 (1878), *Davis v. Beason*, 133 U.S. 333 (1890), and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), and as confirmed in *Torcaso v. Watkins*, 367 U.S 488, 492 n.7 (1961). Chief Justice Moore claimed that the monument did not respect "an establishment of religion" in that it did not concern those duties owed exclusively to the Creator, enforceable by reason and conviction. Rather, the Chief Justice stated that the monument

presented the Ten Commandments as the moral foundation of the law of civil society, including the law of freedom of religion and limited civil government as reflected in the first table of the Ten Commandments. Thus, the Chief Justice confirmed that the monument was not an unconstitutional "law" respecting an establishment of "religion."

The District Court rejected the Chief Justice's proof that the monument did not respect "religion," not because it found the proffered definition unsupported by the constitutional text and history, but because it found the definition "dangerous" and "unwise," leading to results that it could not countenance. 229 F. Supp. 2d at 1313 n.5 (App. 90a). Candidly admitting that it could offer no alternative definition of religion—"lack[ing] the expertise" to do so—the District Court rejected the original, and only, constitutional definition ever embraced by this Court—on the ground that the constitutional definition conflicts with modern Establishment Clause decisions of this Court. *Id.* at 1313-14 (App. 90a-92a).

The Court of Appeals, likewise, rejected the constitutional definition of religion on the sole ground that it "is inconsistent with the Supreme Court's because [it] presupposes a belief in God," 335 F.3d at 1295 (App. 26a), which itself is inconsistent with this Court's acknowledgment that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The Court of Appeals cited no Supreme Court case where this Court has repudiated its endorsement of the theistic definition of religion as embraced by James Madison's *Memorial and Remonstrance*.[5] To the contrary, several justices on this Court

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[5] Quoting verbatim the 1776 Virginia Bill of Rights, Madison stated that "religion" is "the duty that we owe to our Creator" when "the manner of discharging it, can be directed only by reason and conviction, not by force or violence." Thus, he concluded that any person who fails to discharge such a duty is answerable only to God, not men. By this theistic definition of religion, Madison was able to determine those duties subject solely to

have referred to Madison's theistic definition of religion in his *Memorial and Remonstrance* as the source of their understanding of "the individual freedom of conscience protected by the First Amendment." *See Wallace v. Jaffree*, 472 U.S. 38, 53 n.38 (1985). *Accord Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 341 n.2 (1987) (Brennan, J., concurring in the judgment). Additionally, in numerous cases, this Court has explored Madison's *Memorial and Remonstrance*, and other 18th-Century sources, to ascertain the meaning and application of the Establishment and Free Exercise Clauses. *See, e.g., Lee*, 505 U.S. at 590-608, 612-15, 621-27, 633-36, 640-42. Indeed, as evidenced by Justices Scalia's and O'Connor's recent debate over the Free Exercise ruling in *Employment Div. v. Smith*, 494 U.S. 872 (1990), Madison's theistic definition of religion has continued to play a leading role in this Court's Free Exercise jurisprudence. *See City of Boerne v. Flores*, 521 U.S. 507, 541-42, 560-61 (1997). That definition should prevail in this Court's Establishment Clause jurisprudence, for the very text of the First Amendment demands only "one definition of religion:"

> "Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment," and another, much broader, for securing "the free exercise thereof."

Everson, 330 U.S. at 32 (Rutledge, J., dissenting).

Likewise, there is no reason for this Court to disregard the clear language that the Establishment Clause applies only to a "law" respecting an establishment of religion. Even this Court has recently acknowledged that the Establishment Clause is

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individual conscience. J. Madison, *Memorial and Remonstrance*, reprinted with approval in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63-64 (1947).

directed at the exercise of "legislative power." *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). Yet, in "religious display" cases, this Court has, in effect, amended the Establishment Clause, by ruling that the Clause may be violated by either a "statute or practice." *See County of Allegheny*, 492 U.S. at 592.

III. CHIEF JUSTICE MOORE'S OATH IS TO THE CONSTITUTION, NOT THE FEDERAL COURTS.

In recent years, courts have assumed that this Court's precedents prevail over the Constitution as the supreme law of the land. Thus, relying solely on court precedents, the Court of Appeals below rejected the Chief Justice's contention that, because of his oath of office, the District Court had no jurisdiction to enjoin him to remove the monument. *Glassroth*, 335 F.3d at 1302 (App. 42a). Furthermore, the Court of Appeals ruled that "the rule of law" demands that—no matter how erroneous—the Chief Justice must obey the District Court order unless the order is "overturned through the usual appellate processes." *Id.* at 1303 (App. 43a). The Court of Appeals is mistaken.

A. The Chief Justice Cannot Be Enjoined To Act Contrary To His Oath.

For 200 years, federal courts have been exercising the power of judicial review in reliance upon this Court's decision in *Marbury v. Madison*. Today, even critics of the exercise of this power assume that *Marbury* established that the federal courts are above the Constitution, and that the Constitution is what the judges say it is.[6] This is not true. Twice, in *Marbury*, Chief Justice John Marshall stated just the opposite. After taking note of the declaration in Article VI that "[t]his

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[6] *See, e.g.*, D. Limbaugh, *A Clashing of Principles and Jurisdictions*, NewsMax.com (Aug. 22, 2003), *available at* http://www.newsmax.com/archives/articles/2003/8/21/214913.shtml.

Constitution ... shall be the Supreme Law of the Land," Chief Justice Marshall wrote:

> [T]his particular phraseology ... confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and *courts* as well as other departments, are bound by that instrument.

5 U.S. at 180. After a review of several constitution provisions directly related to the exercise of power by the courts, Chief Justice Marshall concluded:

> From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* .... Why otherwise does it direct judges to take an oath to support it?

Id. at 179-80.

For Chief Justice Marshall, the swearing of an oath to support the constitution was especially important:

> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?

Id. at 180. Indeed, Chief Justice Marshall concluded that it would be "immoral" to require a judge to perform his judicial duties in a manner that would violate that judge's oath:

> This oath certainly applies, in an especial manner, to their [judges'] conduct in their official character. How immoral to impose it upon them, if they were to be used as knowing instruments, for violating what they swear to support?

Id.

By ruling that Chief Justice Moore's oath to support the United States and Alabama Constitutions was no defense to a

federal court injunction requiring him to perform his official duties contrary to his oath, the Court of Appeals below transformed the Chief Justice's oath from an oath to support the constitution as the rule governing his official actions to an oath to support the federal judiciary as the rule governing such actions. Such a claim of judicial supremacy over the Chief Justice's oath does not serve "the rule of law," as the Court of Appeals claimed, but the rule of judges. As such, it is a species of judicial idolatry,"[7] suitable, perhaps, for the British monarchy, but not for the American constitutional republic.

In the British Commonwealth, officers of the government swear an oath of allegiance to the king or queen, pledging "faithful and ... true allegiance to [his or her] Majesty ...." Promissory Oaths Act 1868, Ch. 72, § 2 (Eng.). The oath of allegiance to the British monarchy is in the nature of an oath of fealty to another human being who stands in the position of lord, whereas the oath of allegiance to the Constitution is an oath of faithfulness to the **law** that governs a person who has civil power. As Chief Justice John Marshall put it in *Marbury*, a federal judge's oath to decide cases "agreeably to the Constitution," presupposes that the Constitution—as it is written, not as it is interpreted by judges—is the rule of government even for the Supreme Court. 5 U.S. at 180. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1856) (Curtis, J., dissenting).

B. The Chief Justice's Oath Serves As A Check And Balance On Federal Judicial Power.

As pointed out by James Madison in *Federalist* No. 51, a system of separation of powers, accompanied by external checks and balances, is the first essential to establish and maintain the rule of law. Indeed, as Madison observed, the

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[7] *See* Bowman, *Congress and the Supreme Court*, 25 Pol. Sci. Q. 20, 34 (1910).

very nature of man requires that those who exercise civil power at the national level must not only be independent from one another, but subject to "encroachments" by the other co-equal branches in order to "control the abuses of government." *Id.* Additionally, Madison asserted that a second essential of division of power between "two distinct governments," one central and another local, would provide "double security ... to the rights of the people," through a system of state checks and balances upon the central government. *Id.* By creating this "compound republic" for America's civil government, Madison concluded that no one branch of government would come into monopoly power, and thereby, the American people would be protected from despotism.

Those who claim that the federal judiciary need only be governed by their own sense of "self-restraint"[8]—not only stand four-square against Madison's description of the nature of the American constitutional republic, but suffer from "blind hubris" that an unchecked federal judiciary is no threat to the rule of law because it is insulated from politics by the constitutional system of lifetime appointments. *See The End of Democracy? The Judicial Usurpation of Politics*, First Things 18-20 (Nov. 1996). Those who designed the system of appointed federal judges, holding their offices during "good behavior," did not contemplate a judiciary held in check only by the power of impeachment. Rather, as Alexander Hamilton wrote in *Federalist* No. 78, the federal judiciary would be checked, at least, by both the executive and legislative branches of the federal government.

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[8] *See, e.g.*, Chief Justice Harlan Fiske Stone's claim in *United States v. Butler*, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting), that "while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

According to *Federalist* No. 78, a court order is not self-executing, but "ultimately depend[ent] upon the aid of the executive arm even for the efficacy of its judgments." And so it is according to Article II, § 3, which states that it is the duty of the President "to take care that the laws be faithfully executed." Thus, if a court order is contrary to the law of the Constitution, it is the President's duty to decline to enforce such an order. If he does not, then he has failed to honor his oath of office to "preserve, protect, and defend the Constitution of the United States." Recently, however, presidents have been so compliant that some federal courts have even forgotten this Court's rulings that the President is not personally amenable to federal court jurisdiction in matters concerning the performance of his official duties. *See Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality). This salutary rule is, as Justice Scalia noted, necessary to preserve the constitutional structure of separation of powers, and its concomitant system of checks and balances. *Id.* at 826-29 (Scalia, J., concurring). Hence, law suits brought to test the constitutionality of the exercise of federal executive power name as parties defendant persons of cabinet rank whose duties are ministerial (*see, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)), thereby preserving the President's independence to act according to his constitutional oath. *See Franklin*, 505 U.S. at 828 (Scalia, J., concurring).

This rule limiting the jurisdiction of the federal courts is equally applicable to state officials who have taken a similar oath "to support this Constitution." As Madison noted in *Federalist* No. 51, the distribution of power between the United States government and the governments of the several states was designed to provide a check upon the centralization of power. Nowhere is this federalist principle more evident than in the original purpose of the Establishment Clause. From the beginning, it has been the role of the several states, not the United States, to foster the virtues thought necessary to

establish and preserve a self-governing people. Accordingly, the 1776 Virginia Declaration of Rights declared "[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." *Constitution of Virginia, Bill of Rights* (June 12, 1776), reprinted in *Sources of Our Liberties* 313 (Perry rev. ed., Amer. Bar Found. ed. 1978). Furthermore, from the beginning, America's founders understood that the fostering of moral excellence was a task intimately tied to religious teaching. As George Washington put it in his Farewell address, "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." G. Washington, *Farewell Address*, reprinted in *George Washington: A Collection* 521 (W. B. Allen ed. 1988).

When Chief Justice Moore placed the monument containing excerpts from the Ten Commandments in the rotunda of the Alabama State Judicial building, he was truly following the tradition of the founders to acknowledge God as the source of the community morality so essential to a self-governing society. By enjoining the Chief Justice to remove the monument, the courts below have compromised the highest judicial officer of the state of Alabama, requiring him to violate his oath of office or risk being held in contempt of court. This is a blatant misuse of federal judicial power, taken in disregard of the Chief Justice's role in our federal system to preserve the rule of law by serving as a check and balance against the issuance of unlawful orders.

CONCLUSION

For the reasons stated, Chief Justice Moore's petition for a writ of certiorari should be granted.

Respectfully submitted,

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